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No.:

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

FORESTWOOD FARMS, INC.
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD
Respondent

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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126 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Does the holding of the Eleventh Circuit in this action conflict with the decision of the National Labor Relations Board in Wright Line, Inc., 251 N.L.R.B. 23 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. den., 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982), and as interpreted by other circuits?

2. Does the holding of the Eleventh Circuit in this action conflict with decisions of other circuits and of the National Labor Relations Board, where proof established the discharge of the terminated employee would have taken place regardless of any anti union animus?

3. Does the decision of the Eleventh Circuit in this matter conflict

## QUESTIONS PRESENTED FOR REVIEW

## CONTINUED

with the decision of the Fifth Circuit in National Labor Relations Board vs. Brookshire Grocery, 919 F.2d 359 (5th Cir. 1990), wherein the Fifth Circuit held that remedial relief was forfeited under the National Labor Relations Act for lying under oath?

## LIST OF ALL PARTIES TO THE PROCEEDING

Forestwood Farms, Inc. - Petitioner

National Labor Relations Board

United Food and Commercial Workers Local 1657, AFL-CIO

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PETITION FOR WRIT OF CERTIORARI
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Petitioner, Forestwood Farms, Inc. hereby petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The National Labor Relations Board decision of September 29, 1992 is set out in A-1 through A-58; The United States Court of Appeals for the Eleventh

Circuit's decision of August 27, 1993 is set out in B-1 through B-3; and the United States Court of Appeals for the Eleventh Circuit's decision of November 19, 1993 is set out in C-1 through C-3.

## JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 USC §1254 of this Court in that the decision of the Eleventh Circuit conflicts with the decisions of both this Court, as well as that of other circuits. Judgment was entered by the Eleventh Circuit on August 27, 1993. Suggestion of En Banc Consideration was filed on September 16, 1993. The Eleventh Circuit denied the Suggestion of En Banc Consideration on November 19, 1993.

## STATEMENT OF THE CASE

### A. Course of Proceedings

Cassandra Carmichael (Carmichael),

was discharged by Petitioner on August 28, 1991 for insubordination and for refusing to sign her time card.

On September 16, 1991 the United Food and Commercial Worker's, Local 1657 (Union) filed a charge against Petitioner, alleging a violation of the National Labor Relations Act (Act) in regards to the discharge of Carmichael. Forestwood was notified of this charge on September 17, 1991.

On October 11, 1991 Carmichael was denied, after a hearing, unemployment compensation benefits from the Department of Industrial Relations, State of Alabama, as a result of her discharge from Forestwood on August 28, 1991.

On October 18, 1991 a complaint was issued by the general counsel for the National Labor Relations Board (Board) alleging that Petitioner discharged

Carmichael as a result of her past union activities, thus violating §8(a)(3) and (1) of the Act.

A hearing was held before administrative law judge, Harold Grossman (ALJ), of the Board on January 24, 1992. The ALJ entered his decision, with his findings of fact, conclusions of law and a proposed remedy. This decision was entered on April 28, 1992. In his conclusions of law the ALJ found that Petitioner violated sections 8(a)(3) and (1) of the Act and committed a unfair labor practice within the meaning of § 2(6) and (7) of the Act.

On January 4, 1993, Petitioner appealed the ALJ decision to the Board. On September 29, 1992 the Board affirmed the judge's rulings and findings and conclusions and adopted his recommended

order, while excepting to two of his findings.

On October 13, 1992 Petitioner filed a motion with the Board to re-open the record for the taking of newly discovered evidence, and a motion for stay of the Board's order. On December 23, 1992 the Board denied the motions. On January 19, 1993, Petitioner appealed that decision to the Eleventh Circuit Court of Appeals. On March 3, 1993 the Board filed a cross-application for enforcement of its order.

On August 27, 1993 the Eleventh Circuit enforced the cross appeal of the Board and affirmed its order.

On September 16, 1993 Petitioner filed a Suggestion of En Banc Consideration with the Eleventh Circuit.

On November 19, 1993 the Petition for Rehearing and Suggestion of Rehearing

En Banc was denied by the Eleventh Circuit.

B. Statement of the Facts

This action arises from the discharge of Cassandra Carmichael (Carmichael) from the employment of Petitioner, Forestwood Farms, Inc. on August 28, 1991. Following her termination the United Food and Commercial Workers Local 1657, AFL-CIO (Union) filed an unfair labor practice charge with the National Labor Relations Board (Board). An evidentiary hearing on this matter was conducted by an administrative law judge (ALJ) on January 24, 1992.

At the evidentiary hearing it was established that Carmichael was discharged for insubordination and failure to sign her time cards, after repeated directives by management of

Petitioner to do so. Carmichael was the main union activist in the organizing campaign of the Union, which resulted in a six month collective bargaining agreement being signed by Petitioner and the Union in February, 1991. Carmichael was the steward for the Union. She filed grievances on behalf of herself on April 8, 1991 and on June 7, 1991. Petitioner and the Union met regarding those grievances, and they were resolved.

There was no evidence of any Union activities being engaged in by Carmichael between June 7, 1991 and her termination on August 28, 1991. The Union was decertified, effective July, 1991. The evidence was uncontradicted that Carmichael gave a two week notice of her intent to quit to management at Petitioner in July, 1991. The evidence was further uncontradicted that

management did not encourage her to leave or quit, and in fact did not enforce her resignation, allowing her to continue her employment beyond July, 1991.

On August 28, 1991 Carmichael was terminated when she refused to sign her time card after three separate directives to do so by management. While Carmichael had signed the time cards in the past, she refused to do so in a loud and insubordinate manner in front of co-workers. Petitioner was left with no choice, but to terminate her employment. Both Petitioner and co-employee witnesses were presented during the hearing to establish Carmichael's insubordination.

In the ALJ's decision, he found the testimony of Candy Headley, a co-worker of Carmichael, to be creditable. Headley's testimony was in direct contradiction to that of Carmichael, as

to the events immediately preceding Carmichael's termination. By finding Headley creditable, the ALJ determined that Carmichael had been untruthful under oath regarding the events preceding her discharge.

The ALJ in his decision dismissed Petitioner's uncontradicted evidence regarding lack of anti union animus between June 7, 1991 and August 28, 1991 (date of Carmichael's termination), virtually without consideration.

Petitioner took an appeal from the ALJ's decision to the Board, which adopted and affirmed the decision. An appeal was then taken from the Board to the Eleventh Circuit pursuant to 28 USC §2344. This petition results from the Eleventh Circuit's refusal to overturn the Board's decision.

## REASONS FOR GRANTING THE WRIT

*1. Does the holding of the Eleventh Circuit in this action conflict with the decision of the National Labor Relations Board in Wright Line, Inc., 251 N.L.R.B. 23 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. den., 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982), and as interpreted by other circuits?*

The Board established the Wright Line standard in 1980. The Petition for Enforcement filed by the Board in that case was granted by the First Circuit in National Labor Relations Board vs. Wright Line, 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982).

> (Wright Line) mandates three phases of proof. First, the general counsel must show by preponderance of the evidence that a protected activity was a

> motivating factor in the employer's decision to discharge an employee. Such a showing establishes a §8(a)(3) violation unless the employer can show as an affirmative defense that it would have discharged the employee for a legitimate reason regardless of the protected activity. The general counsel may then offer evidence that the employer's proffered "legitimate" explanation is pretextual-that reason either did not exist or was not in fact relied upon-and thereby conclusively restore the inference of unlawful motivation. (N.L.R.B. v. United Sanitation Service, 737 F.2d 936, 939 (11th Cir. 1984).

This Court adopted the Wright Line test in N.L.R.B. v. Transportation Management Corporation, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983). There it was said:

> Under these provisions it is undisputed that if the employer fires the employee for having engaged in union activities and has no basis for discharge, or if the reasons that he offers are pretextual the employer commits an unfair labor practice. He does not violate

> the NLRA, however if any anti-union animus that he might have entertained did not contribute at all to an otherwise lawful discharge for good cause. Soon after the passage of the Act, the Board held that it was an unfair labor practice for an employer to discharge a worker where anti union animus actually contributed to the discharge section. (Id. 398) The Court of Appeals was quite correct, and the Board does not disagree, that throughout the proceedings, the general counsel carries the burden of proving the elements of an unfair labor practice. (Id. 401)

In Universal Camera Corporation v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951) (quoting Consolidated Edison Company v. N.L.R.B., 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1939) the Court stated:

> 'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'. Consolidated Edison Company v. N.L.R.B., 305 U.S. 197, 229 S.Ct.

> Accordingly, it 'must do more than create a suspicion of the existence of the fact to be established... it must be enough to justify, if the trial were to a jury a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' Labor Board vs. Columbian Enamelling and Stamping Company, 306 U.S. 292, 300.'

In this action the administrative law judge did not render a decision based on the substantial evidence. The Board gave a superficial endorsement of the decision without an analysis of the facts. The Eleventh Circuit enforced the counter petition of the NLRB.

The general counsel had the burden of proof. The general counsel was required to establish a prima facie case that Petitioner held some anti union animus against Carmichael, which was the motivating factor for her discharge, and not that she was discharged for cause.

The general counsel failed to establish a prima facie case. There was no evidence of any union activities engaged in by Carmichael or even the Union itself for some two months prior to Carmichael's discharge.

In this case the ALJ cited Wright Line, Ibid., but his decision clearly indicated that he failed to understand the case. In his decision the ALJ stated that the general counsel had established a prima facie case that Carmichael's union activities were a motivating factor in Petitioner's discharge of her. He then stated "the fact that Respondent did not encourage Carmichael to resign when she stated this intention in July, 1992, is insufficient to negate the prima facie case. Respondent has not rebutted this case."

The ALJ suggested by this wording that Petitioner's evidence regarding Carmichael's resignation, as well as Petitioner's evidence regarding Carmichael's insubordination, were important only insofar as the evidence negated Carmichael's union activities being a factor in her discharge. Such a standard is incorrect under Wright Line, Ibid. Forestwood only needed to show that it would have fired Carmichael anyway. Forestwood did prove this.

The Eleventh Circuit holding in this case is in contradiction of that of the Fifth Circuit in Lord & Taylor v. N.L.R.B., 703 F.2d 163 (5th Cir. 1983). There the Court stated:

> Previously in this opinion, we noted that the ALJ's creditability choices were flawed in certain respects. Here, we must add, however, that not only does the ALJ ignore all management

> testimony, he also impermissibly ignores all testimony by Kevauver that would hurt her case. We cannot say that the decision which ignores a portion of the record is supported by substantial evidence. (Id. at 169)

The Court further stated at page 170:

> Given the ALJ's finding that the threat did take place, it was error for him to find that it was not the basis for her termination. Lord & Taylor is not required to evaluate Kevauver's ability to carry out a threat before it can discharge her. See e.g. N.L.R.B. v. Moore Business Forms, Inc., 574 F.2d 835 (5th Cir. 1978); Florida Still Corporation vs. N.L.R.B., 529 F.2d 1225 (5th Cir. 1976); N.L.R.B. v. I.V. Sutphin Company - Atlanta, Inc., 373 F.2d 890 (5th Cir. 1967). It is the province of management to manage, and the Board is not entitled to second guess a response to insubordination.

The ALJ totally ignored in his decision Petitioner's evidence supporting the discharge of Carmichael for her

insubordination.[1] The ALJ attempted to justify his decision that Carmichael did not commit insubordination by the following statements: "during the break, she was asked by the company president to sign the card, and replied she would do so on company time, not her own time. This did not constitute a refusal to sign the card, but, rather an assertion that she would do so on the company's time." (R1-253). Previously, the ALJ had stated: "Headley, a witness for Petitioner, was a truthful witness with good recall of the events. I credit her testimony, ...". (R1-251). Following is Headley's testimony regarding

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[1]Centre Property Management v. N.L.R.B., 807 F.2d 1264 (5th Cir. 1989) - In determining if the Board decision is supported by substantial evidence, court must consider evidence which fairly detracts from the decision.

Carmichael's actions that led to her discharge on August 28, 1991.

Q. Again, what did you observe Mr. Scott to say to Cassandra?

A. He asked her to sign her time card, and she told him, no; she would on his time, not hers. He told her to come into his office. She said no. He said, "come into my office and sign your time card or you will be terminated". So, she told him no. She said, "I told you one time I will on your time, not mine." And then she sat there and rolled her eyes and he said, "well, you're fired."

Q. So, how many times did you observe Mr. Scott asking her to come and sign the card or either to come with him?

A. He told her about three times.

Q. Is it your testimony that each of the three times she responded to him in some fashion?

A. Yes, ma'am

Q. And you indicated she got loud

A. Yeah.

Q. Was she loud from the very beginning? Just what happened?

A. She started hollering, telling him, no, that she would only do it on his time not hers.

Q. So, if there is testimony that Cassandra didn't respond, your testimony is that's not true. That wouldn't be true.

A. Yes, 'cause she was telling him no'. (R2-159, 160).

She also stated on that occasion that Carmichael's demeanor was not respectful

of Scott. (R2-155).

The insubordination was more than just the refusal to sign the time card. The insubordination was the disrespectful demeanor exhibited to her boss in front of co-workers, raising her voice, and refusing a legitimate direct request of her boss, repeated three times under threat of termination. The ALJ did not discuss the actual aspects of the insubordination by Carmichael at any point in his decision.

Ordinarily, as the trier of the facts, deference should be given to the judge's opportunity to observe the demeanor of the witnesses to determine credibility. Traditional aids to determine the credibility of witnesses are based upon the impeachment of testimony, inconsistency of responses, whether the witness has something to gain

from the testimony, and the general demeanor of the witnesses. As the reviewing Court, this Court can make a determination on credibility of witnesses in each of the same categories, with the possible exception of demeanor. The ALJ "credited" the testimony of certain witnesses by ignoring certain portions of the evidence and by making inconsistent credibility choices. In every instance he "credited" the testimony of every Union witness with the exception of the portion of Carmichael's testimony dealing with her discharge. There her testimony was so totally incredible, as well as being in direct opposition to an impartial third party witness, the ALJ was left with no choice other than to make an exception to his rule of accepting at face value the utterance of

each Union witness.[2]

The ALJ's decision attempts to trace an anti-union animus of Petitioner, as specifically addressed to Carmichael, for a period originating months prior to any evidence that Petitioner had any knowledge that Petitioner's employees were being organized by the Union. The ALJ bases his holding that the general counsel carried the burden of establishing a prima facie case from these early beginnings, through the contract negotiations process, through the five month contract with a lapse from June 16, 1991 until Carmichael's discharge on August 28, 1991. Since it

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[2]National By-Products, Inc. v. N.L.R.B., 931 F.2d 1231 (7th Cir. 1991)- Court may set aside Board decision if the court cannot conscientiously find that evidence supporting the decision was substantial when viewed in light of the record as a whole, including the body of evidence opposed to Board's view.

was inconsistent with his holding, the ALJ ignored the fact that the Union had been de-certified for some two months, and Carmichael had quit her job with Petitioner, all before the discharge took place.

Headley's testimony supported and justified Carmichael being fired for insubordination. She witnessed Scott asking Carmichael to sign the card and Carmichael telling him no in front of other co-workers. She further heard Carmichael raise her voice with Scott and refuse to come to his office in spite of the threat of the termination if she did not do so. At the time this exchange took place Carmichael was still on the clock at Petitioner and being paid for her time. Headley testified that she had always found both Scott and Shipp to be fair and non-harassing. She felt that

Carmichael's demeanor not respectful of Scott. (R2-155). She further noted that Scott did not tell Carmichael she was fired until after the break had ended. (R2-167). Based upon Headley's testimony, Petitioner's decision to discharge Carmichael was supported by the facts. There was absolutely no proof or even an inference it had anything to do with her past union activities which had ended two months before. Petitioner's work rules give management the right to terminate employees for insubordination, which Carmichael clearly was on this occasion.

There was considerable evidence presented during the hearing that both Scott and Shipp (Carmichael's supervisor) had shown leniency to Carmichael throughout her employment. Carmichael admitted that she had been warned by

Shipp that she talked too much. (R2-88). This was confirmed by Shipp (R2-122, 124, 137, 138). Scott also overlooked disciplinary matters on Carmichael (R2-195, 203, 212). This leniency was reinforced by Scott's decision not to insist on Carmichael's resignation in July, 1991. The evidence is uncontradicted that Scott did not encourage Carmichael to leave or quit at any point. (R2-91, 92, 196).

Headley's unbiased testimony clearly established Carmichael's insubordination in refusing to sign her time card, and the manner in which she refused. It was well established that employees sign time cards, even when on break. Even Carmichael admitted that she had signed her time card during breaks. (R2-58-59). Therefore, the ALJ's reliance upon her refusal to sign because she was not on

"her time" was ridiculous. Even if Carmichael said this, what justification is that for refusing to obey the order of your supervisor particularly when told it will result in your discharge? Carmichael was on company time when the statements were made, whether it was before, during or after break. The signing of the time card was for her benefit so that she could get paid for hours worked. Scott repeatedly gave her opportunities to avoid disciplinary action, yet she was loudly and blatantly insubordinate to him in front of co-workers. Before she was terminated she was told that she would be fired if she continued to refuse to sign the card. She made the decision, and she should live by it.

It is interesting to note that the ALJ, apparently, condoned Carmichael's

disrespectful, insubordinate air toward her boss, as well as her mandating when she would obey a legitimate request of her boss. If the events of this occasion, as related by Headley and Scott, who were the witnesses found to be creditable by the ALJ on these events, do not constitute insubordination it is hard to conceive of what would amount to insubordination. In front of other employees Carmichael refused three times to Scott and at least once to her supervisor to sign her time card before, during and after her break. It would have taken her thirty seconds to perform the task. If Carmichael did not commit insubordination, as determined by the ALJ, (R1-253) why did she lie about the events of her discharge? The ALJ found she did lie about those events when he

credited the testimony of Headley. It is undisputed that she is the one witness with the most to gain by lying. In spite of disbelieving her testimony on the cause of the action that was presented before him, the ALJ ruled for Carmichael.

Just as in Lord & Taylor, Ibid. the ALJ in this action relied upon evidence that was not supported by the record. He erroneously represented the record in other instances; and, he failed to give a full and fair consideration to Petitioner's evidence which tended to undermine his position. The ALJ misstated the testimony presented at the hearing on several occasions in his decision in support of his conclusion. The ALJ sought to interject his own decision in an area that is traditionally, and clearly a management prerogative, that being

discharge for insubordination.

It is clear that the evidence presented by Petitioner showed sufficient grounds for discharge due to insubordination.

*II. Does the holding of the Eleventh Circuit in this action conflict with decisions of other circuits and of the National Labor Relations Board where proof established the discharge of the terminated employee would have taken place regardless of any anti- union animus?*

The general counsel's prima facie case is predicated upon alleged anti-union animus by management of Petitioner for the Union's involvement that ended, as a practical matter on June 17, 1991. The only testimony offered concerning matters between June 17, 1991 and August 27, 1991 by any witness, involved

Carmichael's notice of intent to terminate her employment around the beginning of July, 1991, and Scott's allowing her to work beyond her quit date. There was no direct evidence supporting the general counsel that the events of August 27 and 28, 1991 had any relationship to Carmichael's prior Union activities. Without such direct evidence, only an inference can be raised. With the general counsel's burden requiring a showing by a preponderance of the evidence that protected conduct was a motivating factor in Petitioner's discharge of Carmichael together with a lack of direct evidence of such motivation, coupled with at least a two month period of no Union activity or problems for Carmichael this burden is impossible to meet.

In Chicago Tribune Company vs.

N.L.R.B., 962 F.2d 718 (7th Cir. 1992), the Court analyzed the ALJ's decision as follows:

> First, it is true, as the ALJ stated, the Tribune knew Kaczmarek was a union activist and that he actively sought representation by the union. But neither an employee's union activism nor an employer's knowledge of that activism constitutes sufficient evidence for a finding of anti-union animus. Second, coincidence in time between union activity and discharge or discipline is one factor the Board may consider. NLRB v. Industrial Erectors, Inc., 712 F.2d 1131, 1137 (7th Cir. 1983). But mere coincidence is not sufficient evidence of anti-union animus. Furthermore, the Tribune presented evidence that Kaczmarek's poor work record dated to well before the union election, indeed, to before the petition for that election. Third, having found the October 12 suspension was the result of Kaczmarek's union activities, the ALJ proceeded to construct a self-rising house of cards, garnering support for his subsequent findings that each succeeding disciplinary action was unlawful from his previous determinations that the

> proceeding one or ones had been unlawful. While a pattern of activity may evidence anti-union animus the pattern purportedly seen here is undocumented and illusory. Lastly, whatever circumstantial evidence there may be is certainly too remote, indeterminate and ethereal.

The uncontradicted evidence was that Carmichael gave notice to Scott at the beginning of July, 1991 that she was quitting effective the end of the month. (R2-90). She testified that after giving this notice that Scott told her to wait, and that he did not encourage her to leave or quit. (R2-91, 92). Scott verified this testimony and indicated Carmichael gave proper notice of quitting, but he chose to overlook it. (R2-197). There was absolutely no evidence of any Union activities occurring at Forestwood involving Carmichael or anyone else from the end of

the grievance meeting on June 17, 1991 to the present. (R2-102). In the interim the Union's certification was revoked by the regional director, effective July 30, 1991, the same day Carmichael had given notice of her intent to resign. For the ALJ to ignore these uncontradicted facts is unjustified. Just as in Tribune the ALJ here has constructed a "self-rising house of cards", which tumbles down when objectively analyzed.

The Board in this action did not follow many of its past decisions which have determined that the timing of the disciplinary action in relation to past or present union activities is always an important factor. In regards to action taken after union activities have ceased the Board has clearly held that this does evidence a lack of anti-union animus. In

Stop and Shop Companies, Inc., 259 NLRB 124, the Board held:

> Considering that an employee had not been particularly active in the Union since his role in the organizing campaign four years earlier, and considering that the employer's relationship with the Union now seems amicable, there was insufficient evidence to prove that the employee's discharge was caused by his organizational activity. The employee's discharge allegedly for having alcohol on his breath at work, was hasty, without prior warning and inconsistent with the discipline other employees had received.

In the case at hand the discharge was not without prior warning and was not inconsistent. As Scott testified at the hearing, he had fired others for insubordination prior to Carmichael's discharge (R2-189, 190).

In Zarda Brother's Dairy, Inc., 234 NLRB 15, the Board held that an employer lawfully discharged an employee who was known to have been the organizing union's

chief proponent, even though the employer failed to investigate the "alleged misconduct" that immediately preceded the discharge. The Board found that the dischargee had a history of poor work habits and attitude. There was no evidence that the employer believed the dischargee was still interested or active in the union or that it viewed the individual's activities of the union with any concern.

In the case at hand there was certainly no need for Petitioner to view Carmichael's prior activities in the Union with any concern. The Union's representation had effectively ended two months before this action was taken. There was no evidence that Carmichael had engaged in any Union activities for over two months prior to her discharge. There was certainly no reason for Scott to take

any action against Carmichael after such a long period.

In Walter Carpet Mills, Inc., 259 NLRB 96, the Board upheld the discharge of the employee, who was a leading union organizer where the final warning was not issued until the passage of six months. The complainant failed to prove a prima facie case. Also, in National Medical Care, Inc., 268 NLRB 118, the Board found that the employee was lawfully discharged for rules violations and insubordination where his prior union activity was long gone and forgotten. In S. S. Kresge Company, 234 NLRB 72, an employee's discharge was lawful even though he was an exemplary employee and was discharged pursuant to an automatic termination rule that had little justification. The Board found that there was a lack of evidence to support the contention that the

discharge was because of the union activity because there was:

> (1) an eight month period between the employee's union activity and his alleged unlawful discharge; (2) an absence of any form of union activity on his part; and (3) the employer did not participate in any other form of unlawful activity close to the time of the discharge.

(Also in support Salem Tube, Inc., 296 NLRB 19, employee discharged eighteen months after union campaign; Maple Shade Nursing Home, Inc., 223 NLRB 1475, where the discharge occurred three months after the union election without any significant intervening demonstration of anti-union animus).

Also, in Wickes Lumber Company, 239 NLRB 162, the Board found that an employer did not unlawfully discharge a union activist where the employee first voluntarily quit after refusing to sign a

written reprimand from the unexcused absence for an unexcused absence from the previous day.

The evidence was clear and uncontradicted that Carmichael quit her job at Petitioner, effective July 31, 1991. The notice she gave was a proper notice for quitting (R2-197). It could have been enforced by Scott had he chosen to do so. He did not even encourage her to leave (R2-91, 196). How can there be any merit to the Board's contention that Scott harbored animus to Carmichael for union activities that predated this notice to quit? There was absolutely no evidence that the decision by Carmichael to quit was in any way connected with the Union, or her organizing efforts. Nor was there any evidence that her apparent decision to continue working was in any way connected with the Union. There was

an absence of evidence of any Union activities being undertaken at Petitioner's employment, particularly by Carmichael from June 17, 1991 until the present. The evidence was not in issue, and was acknowledged by both parties. Regardless of any other evidence this alone is sufficient, with the noted absence of Union activity during this period, to conclusively establish that there was no anti-union animus in the decision to discharge Carmichael.

An employer, absent anti-union motivation, may discharge an employee for good reason, bad reason, or no reason without violating the Act. (NLRB v. Southern Florida Hotel, 751 F.2d 1571 (11th Cir. 1985); also in support, Federal-Mogul Corporation v. NLRB, 566 F.2d 1245, 1260 (5th Cir. 1978). Union membership is not a guarantee against

discharge. (NLRB v. Ray Smith Transport Company, 193 F.2d 142, 146 (5th Cir. 1951).

The testimony was clear that Carmichael refused a direct order of her supervisor, and then her boss at least four times, even when she was warned before her last refusal that she would be terminated if she continued to refuse. She raised her voice to the point of "hollering and screaming", while Scott never raised his voice. She never apologized after being terminated or sought to sign the card at that point. Carmichael asked to be fired on that day, and she received what she wanted. Imagine the repercussions for an employer with his other workers who witnessed such a tirade by Carmichael if she were ordered back to work. How could any employer thereafter expect his work

directives to be followed by any worker? Here, the ALJ and the Board improperly sought to second guess Scott's personnel decision regarding Carmichael and to interfere in his decision regarding discharge when that right was exercised by Scott for legitimate reasons. (NLRB vs. Southern Florida Hotel, Ibid; also in support NLRB vs. Fansteel Metallurgical Corporation, 306 U.S. 240, 254, 59 S.Ct. 490, 495, 83 L.Ed. 627 (1939); NLRB v. Computed Time Corporation, 587 F.2d 795 (5th Cir. 1979). The Board also did not follow its own prior decisions, which have regularly upheld the termination of employees for violation of various company rules.

The Board has upheld employees' discipline and termination due to the employee's adamant refusal to sign a written warning, coupled with extreme

profanity directed at supervisor (See Safety-Kleen Corporation, 269 NLRB 602). In Metro Center, Inc., 267 NLRB 67, the NLRB held that an employee was lawfully discharged for refusing to sign a disciplinary form. The form was issued to the employee for engaging in excessive discussions with fellow employees. (Also in support, Wick's Corporation, Wick's Lumber, 239 NLRB 1128).

On a final note, Carmichael had an opportunity to save her job. In spite of her poor work history, her repeated warnings, her at least four (4) opportunities to sign her card August 27 and 28, 1991, had she simply gone into the office to sign the card she would have saved her job. (R2-225). The evidence showed that at no point prior to August 28, 1991, had Scott ever given Carmichael an ultimatum to either follow

his order or be fired. Carmichael was certainly not misled by Scott's previous leniency to believe that she had anything other than a clear choice: obey or be fired.

If the ALJ's position is to be followed, he would argue that Carmichael did not go into the office because she was released from work and on her own time. While this is not consistent with the facts, (R2-148, 149, 225, 230, 205, 231, 232) still, responding to that argument, consider the illogic of it. Are the few remaining seconds of break time worth losing a job? She was eventually given a directive by Scott to come to the office or be terminated. At that point, if not before, she knew that she must comply, or be fired. It was a clear decision, obey or be insubordinate. More importantly she was loudly and

blatantly insubordinate in front of co-workers. Carmichael chose the route of insubordination and promised termination. Petitioner was justified in terminating her employment.[3]

*III. Does the decision of the Eleventh Circuit in this matter conflict with the decision of the Fifth Circuit in National Labor Relations Board vs. Brookshire Grocery, 919 F.2d 359 (5th Cir. 1990), wherein the Fifth Circuit held that remedial relief was forfeited under the National Labor Relations Act for lying under oath?*

The Fifth Circuit ruled in N.L.R.B. v. Brookshire Grocery Company, 919 F.2d 359 (5th Circ. 1990), that an employee guilty of lying under oath would not be

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[3]N.L.R.B. v. P.I.E., 894 F.2d 887 (7th Cir. 1990) - court must take into account equitable considerations.

entitled to remedial rights under the National Labor Relations Act, even if he were discharged for engaging in protected activity. While Carmichael was not discharged for engaging in protected activity, the Board's remedial order of reinstatement and back pay, and the subsequent enforcement of that order by the Eleventh Circuit, are in direct conflict with the holding in Brookshire, as well as that of other circuits. In Brookshire, at 364, the Court held:

> Furthermore, even assuming that Moise was engaged in protected activity, he forfeited his remedial rights by taking confidential company information and lying under oath about the source of his information. We have held that where 'the purposes and policies of the act would not be effectuated by reinstatement' or other remedial measures, then denial of the traditional remedies accorded under the Act is proper. N.L.R.B. vs. Big Three Welding Equipment Company, 359

> F.2d 77, 84 (5th Cir. 1966); accord Iowa B. Packers, Inc. v. N.L.R.B., 331 F.2d 176, 185 (8th Cir. 1964).

The Court went on to hold at page 365:

> ...it simply is inappropriate to require a company to rehire a worker who took information from his supervisor in the middle of the night, see Big Three Welding, 359 F.2d at 84, or who lied to the state in an attempt to gain unemployment benefits at the state's and company's expense, see Vilter Manufacturing Corporation, 2171 N.L.R.B. 1544. Neither reinstatement or back pay is appropriate in this instance.

Carmichael's testimony regarding the events preceding her termination was that she told her supervisor that she was not feeling good. Shortly thereafter the President of the company, Everett Scott, came out of his office, and from ten feet away asked "was you on the time clock"? Carmichael responded "yes", then Scott told her she was fired. (R2-56). She

asked why she was being discharged and Scott said "insubordination" (R2-57). Even the ALJ could not swallow that testimony as being truthful. Candy Headley's testimony, as previously shown herein, was in direct contradiction to that of Carmichael's. The ALJ credited Headley's testimony, thereby finding that Carmichael lied under oath. In spite of this the ALJ recommended reinstatement with back pay. Both the Board and the Eleventh Circuit rubber stamped this recommendation.

The holding of the Eleventh Circuit in this cause is also in contradiction to the general concept that someone who has been suspended or discharged for cause should not be reinstated with back pay. (See N.L.R.B. v. Fansteel, 306 US 240 261, 59 S.Ct. 490, 83 L.Ed. 627 (1939).

In Communication Workers of America

vs. NLRB, 784 F.2d 847, 850 (7th Cir. 1986), the Court held "No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause..." First, there must be a "cause...". Next there must be a casual length between the misconduct and the discharge." Since Carmichael was discharged for cause, she can be neither reinstated nor awarded back pay.

At the very least the Eleventh Circuit should have remanded to the Board to order it to review new facts of Carmichael's mitigation of damages and changes with Petitioner's work location and work force to determine whether the remedy ordered by the Board should be enforced. (In support: N.L.R.B. v.

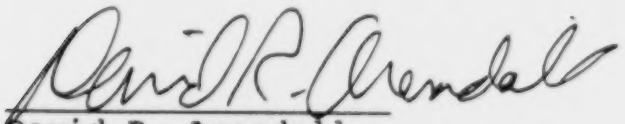
Auburn Foundry, Inc., 791 F.2d 619 (7th Cir. 1986; F.E. Hazard, Ltd. v. N.L.R.B., 917 F.2d 736 (2nd Cir. 1990).

## CONCLUSION

Petitioner recognizes the extreme rarity with which a petition such is this is granted. The rarity is probably multiplied by many factors where the main issue raised is one that may be capable of two interpretations. While reasonable minds may differ, the petition raises issues that are of compelling importance to Petitioner, and do present direct conflicts between circuits and with reasonable interpretation of decisions of this Court. As the Court of last resort in this matter, Petitioner requests the opportunity to more fully present the

facts, and underlying authorities for hearing by this Court.[4]

Respectfully submitted,



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[4]Arrow Automotive Industries, Inc. v. N.L.R.B., 853 F.2d 223 (4th Cir. 1988) - Supreme Court is the final arbiter of the meaning of the National Labor Relations Act.

# APPENDIX A

# NATIONAL LABOR RELATIONS BOARD
# DECISION OF
# SEPTEMBER 29, 1992

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FORESTWOOD FARMS, INC.

AND CASE 10-CA-25545

UNITED FOOD AND COMMERCIAL WORKERS
UNION LOCAL 1657, AFL-CIO

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Order filed September 29, 1992

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DECISION AND ORDER

On April 28, 1992, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions

and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended

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[1]The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). we have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent asserts that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that such contentions are without merit.

[2]In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employee Carmichael, we do not rely on the judge's finding that the Respondent's attorney suggested that the Union find Carmichael another job. The record is unclear as to who suggested that the Union find Carmichael another job. However, even without relying on this finding, we agree with the judge's conclusion that the General Counsel established a prima facie

order.

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case.

Chairman Stephens, in agreeing with the judge that the Respondent failed to rebut the General Counsel's prima facie case, finds it unnecessary to rely on *Paradise Post*, 297 NLRB 876 (1990), a case in which he dissented.

The judge's decision contains the following errors which do not affect the result. In secs. E and F of his decision, the judge refers to certain events as occurring in 1992 rather than 1991. Additionally, the judge indicated that the Union's witness, Seidenfaden, testified that when the Union filed its petition for certification, the Respondent's president, Scott, called him and told him, "My people don't want a union." The judge further stated that "Scott agreed that he called Seidenfaden, thus corroborating the Union representative." The Respondent excepted to the judge's implication that Scott admitted he said, "My people don't want a union." A review of the record shows that Scott only testified to the fact that he called the union representative, and did not admit that he told Seidenfaden that the Respondent's employees did not want a union.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

ATLANTA BRANCH OFFICE

FORESTWOOD FARMS, INC.
AND
UNITED FOOD AND COMMERCIAL
WORKERS UNION LOCAL 1657, AFL, CIO
CASE 10-CA-25545

## DECISION

### Statement of the Case

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on September 16, 1991, by United Food and Commercial Workers Local 1657 (the Union). Complaint issued on October 18, 1991, and alleges that Forestwood Farms, Inc. (Respondent, or the Company), on October 28, 1991, discharged employee Cassandra Carmichael because of her membership in

and activities on behalf of the Union, thus violating Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

A hearing was held before me on this matter in Birmingham, Alabama, on January 24, 1992. Thereafter, the General Counsel and Respondent filed briefs. Upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

The pleadings established that Respondent is an Alabama corporation, with an office and place of business located at Birmingham, Alabama, where it is engaged in the processing of vegetables into cut products. During the calendar year preceding issuance of the complaint, a representative period, Respondent purchased and received at its Birmingham,

Alabama, facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Alabama. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

The pleadings as amended at the hearing established that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. The Union's campaign and certification

The Union began an organizing campaign in February 1990. The leading Union proponent was Cassandra Carmichael, who obtained signatures on 19 Union authorization cards. Company president Everett W. Scott, Sr., denied knowing this until the day of the hearing. However,

Carmichael testified without contradiction that Scott called her a "troublemaker" on several occasions, and that he had never applied this term to her before the beginning of the Union campaign. She also testified without contradiction that Scott told a supervisor to handle her with kid gloves because she was reporting back to the Union. I credit her testimony.

The Union made a written demand for recognition, and George Seidenfaden, the Union's secretary/treasurer, testified that Scott called him and asked the meaning of the letter. Seidenfaden explained it, and Scott replied that his "people don't want a union." Seidenfaden answered that the Union's position was based on signed authorization cards. Scott agreed that he called Seidenfaden, thus corroborating the Union

representative. A representation petition was filed on May 11, 1990[1] and a Board election was held, at which Carmichael participated as a Union observer. On July 2, 1990, the Union was certified as the representative of Respondent's food preparers and processors, with certain exclusions.[2]

B. The bargaining, the contract, the Company's objections to Carmichael and the decertification

1. Summary of the evidence

Bargaining began in November 1990, and Company owner Scott attended the first 2 sessions, together with Attorney Arendall. The Union was represented by Union official Seidenfaden and by

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[1]C.P. Exh. 1.

[2]G.C. Exh. 2.

Carmichael. The latter was the only employee representative of the Union, and attended most of the bargaining sessions. In the second session, according to Seidenfaden, Scott began criticizing Carmichael, and this led to a dispute between Seidenfaden and Scott. Thereafter, the Company was represented only by Attorney Arendall.

Seidenfaden testified to a number of conversations with Arendall in which Carmichael was discussed. Thus, in late January 1991, after a negotiation session in Arendall's conference room, Arendall inquired as to the identity of the individual the Union intended to appoint as shop steward. Seidenfaden named Carmichael, and Arendall said that this was a mistake. When Seidenfaden asked the reason, Arendall replied that there was a

"lot of animosity" between Scott and Carmichael because of "all this mess." When Seidenfaden asked Arendall to explain what he meant, the latter referred to "the last several months with your Union." Arendall said that the Union could get a better contract if it agreed not to designate Carmichael as steward. The Company stated that she talked too much, and would abuse the position of steward. Seidenfaden replied that the Union would remove Carmichael as steward if she did not perform her job, but otherwise rejected the Company's proposal.

Seidenfaden further affirmed that he had a telephone conversation with Arendall in February 1991, in which the attorney told him that Scott was "considerably upset" over the Union's intention to designated Carmichael as steward.

Arendall suggested that the Union get her another job at a company where the Union had a contract, and Seidenfaden rejected this proposal.

The parties reached an agreement in February 1991. However, according to Seidenfaden, the Company withdrew its position on prior tentative agreements, principally one which specified a 3-year duration to the contract. The Company reduced this term so that the agreement ran for only a few months. Seidenfaden testified that Arendall told him that some of the things he had agreed to were "taken off the table" because of the Union's failure to address the issue of Carmichael as the steward. The Company wanted "peace and harmony", and could not be assured of that with Carmichael as the steward. Further, Seidenfaden averred, Arendall

informed him that the Company intended to file a decertification petition.

Attorney Arendall testified, and partially corroborated and partially denied Seidenfaden's testimony. He agreed that the subject of Carmichael's "talking" had come up in an early bargaining session, and that the Company expressed concern that Carmichael would "abuse" the shop steward position by going to various work areas and interfering with production. Arendall also agreed that on "at least one occasion, if not two, "he discussed Carmichael with Seidenfaden. The Company was worried about the Union's right to designate stewards under the proposed clause.[3] Arendall felt that the Company and the Union "would be at odds

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[3]G.C. Exh. 3, Art. XVI. The Union could appoint 2 stewards.

with each other over whether she (Carmichael) was doing Union duties or was goofing off from her work." However, Arendall denied that he ever told the Union not to appoint Carmichael - the Company's concern was with the Union's power to designate stewards under the proposed clause. Arendall asserted that it was "given" that Carmichael would be the steward. He confirmed Seidenfaden's testimony that the latter promised to remove Carmichael in 2 months if she did not work out. Asked why Seidenfaden would have said this if the Company had not expressed disagreement with her appointment, Arendall replied that the Company's concern was with the steward

clause.[4]

Arendall did not specifically deny that he told Seidenfaden that there was a lot of animosity between Scott and Carmichael because of "this mess." Nor did he specifically deny suggesting that the Union get Carmichael another job. According to Arendall, the issue of finding another job for Carmichael was raised by Seidenfaden, as something he would have to do if he removed Carmichael as steward. Arendall denied that there had been a tentative agreement on a 3-year term for the contract. Nonetheless, he asserted that there had been a "change" to

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[4]The contract provided that "/t/he shop stewards shall not use their position as shop steward as an excuse to avoid performing their duties to the Employer". Ibid.

"the short contract." The reason for this was the fact that an employee had approached Scott and had asked how to get the Union "out." This was the reason for the "change," not Company opposition to Carmichael as a Union steward.

On February 25, 1991, the parties executed a collective bargaining agreement which ran from February 22, 1991, to July 2, 1991.[5] The latter date was the anniversary date of the certification. On February 25, 1991, the Union notified the Company by letter that Carmichael was designated as one of the shop stewards.[6] On May 1, 1991, a decertification petition was filed, and the Union thereafter filed a disclaimer of interest and requested

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[5]G.C. Exh. 3.

[6]G.C. Exh. 4.

withdrawal of its original petition. On July 30, 1991, the Regional Director for Region 10 revoked the certification.[7]

2. Factual analysis

Attorney Arendall's position that the Company did not express opposition to Carmichael's appointment as steward, but merely to the language of the steward clause in the contract, is disingenuous. The clause was a standard one giving the Union the right to appoint stewards. There is no reason for the Company's opposition to this clause unless it objected to one of the stewards being appointed. I credit Seidenfaden, and find that Arendall told him that there was a lot of animosity between Scott and Carmichael because of "this mess," which

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[7]G.C. Exh. 5.

was defined as the Company's experience with the Union. I also find, crediting Seidenfaden, that Arendall told him the Union could get a better contract if it agreed not to appoint Carmichael as steward, and suggested that the Union get her another job with a different Company.

Although Arendall denied that there had ever been tentative agreement on a 3-year term for the contract, he admitted that there had been a "change" to a "short term contract." I infer that there had been tentative agreement on a longer contract, otherwise there would have been nothing to "change." Although Arendall asserted that the reason for the change was an employee's inquiry to Scott on how to get the Union out, and, in fact, a decertification petition was filed, this did not take place until May 1, 1991,

several months subsequent to Arendall's and Seidenfaden's discussions about a contract. Without making a finding on Arendall's hearsay as to what an employee may have told Scott about decertification, I credit Seidenfaden's testimony that Arendall told him, at about the time of signing the agreement, that some things had been "taken off the table" because the Company wanted "peace and harmony," and was not assured of having it with Carmichael as a Union steward. One of the matters taken off the table was a 3-year term for the agreement.

C. Carmichael's employment history until April 1991

Carmichael started working for the company as a vegetable processor in July 1989. Her supervisor was Donald Shipp. He testified that Carmichael needed "real

close supervision." Company owner Scott contended that Carmichael was a marginal employee from the beginning. Her shortcoming was talking, and her habit of ceasing to work while doing so.

Scott contended that he talked to Carmichael about this problem, and the Company produced records entitled "Employee Warning Report." However, most of these record absence or tardiness. Scott averred that they are merely used for record keeping on attendance, and do not constitute disciplinary records. The first one is dated February 15, 1990, about the time of the beginning of the Union campaign, and states that Carmichael could not work because of sickness in the family.[8] Scott testified that it was

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[8]R. Exh. 2.

Company policy to "write up" every time an employee was absent, and agreed that it was probable that Carmichael had been absent previously during the 7 or 8 months that she had then been employed. However, he could not explain why there were no write-ups recording such prior absences.

There are 5 more such reports in 1990, and several more of similar nature in 1991.[9] The first report of a different nature is dated November 26, 1990, at about the time the Company and the Union started bargaining. It states that Carmichael left the building without clocking out.[10]

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[9]Ibid.

[10]Ibid. Carmichael stated that she left the building to mail a letter while on a break. Although there is no evidence that she exceeded her break period, one of Scott's sons told her when she returned that she had left the property on Company time, because the Company was responsible for her unless she clocked out.

The next such report is a written statement from Supervisor Shipp dated December 6, 1990, stating that he saw Carmichael in a cooler with "C.J." He asked her what she was doing there, and received no response.[11] Supervisor Shipp submitted a written report of Carmichael's "insubordinate behavior" on January 22,

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[11]Ibid. Carmichael affirmed that C.J. was a truck driver, and that when the truck drivers pull the lettuce out of the cooler, employees go in to see how much is there. According to carmichael, Scott came over to her work area, "insulted" her in front of her co-workers, and said that he would fire her if he caught her in the cooler again with C.J. Scott testified about this, and asserted that Carmichael had no authority to be in the cooler checking on lettuce. Although Shipp's statement was placed in Carmichael's file, Scott did not give her an opportunity to submit a written statement.

1991.[12]

Scott agreed that there was more typewritten statements in Carmichael's file than there were in other employee files. He stated that he did not take any disciplinary action on these statements. Asked then why they were filed, Scott said that he had a faulty memory.

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[12]Ibid. Shipp's statement alleges that Carmichael was talking with a loud voice, that he ordered her to lower it, and that she replied she was not the only one talking. When Shipp said that she was the only one talking in a loud voice, Carmichael began screaming. She later began to "settle down" and resume her work. Respondent submitted a written statement from employee Randy Scott corroborating Shipp. Carmichael testified that she was not the only one laughing and talking. Everett Scott testified that Carmichael was not given a copy of Randy Scott's statement, and was not given an opportunity to present her side of the story. As explanation, Scott said that he took no disciplinary action. Asked why he then placed the 2 written reports in Carmichael's file, Scott replied, "Just for recordwise."

D. Carmichael's grievances

1. Summary of the evidence

On April 6, 1991, Carmichael filed a grievance alleging that she had been told to go home early, and requested compensation for lost time.[13] Carmichael was the only employee who filed a grievance. Elaise Fox, a Union business agent, testified that the Company granted this request.

On June 6, Carmichael received a warning report alleging that she had thrown a knife into a box of onions and had opened up an air valve.[14]

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[13]G.C. Exh. 6.

[14]R. Exh. 2. Scott asserted that he was called to Carmichael's work area because she was not working properly, that she was upset, and that threw a knife at somebody which went into a cardboard box. Carmichael retrieved it, and then turned the air pressure on, which "blew" everybody away. Carmichael contended that the knife fell into the box, that Scott pushed the box "on" her, and that she

On the next day, June 7, 1991, Carmichael filed a grievance alleging that Scott was harassing and intimidating her because she was the shop steward, and was attempting to get her to quit her job.[15] Business agent Fox made a telephone call to Scott in which she requested a meeting on the subject of Carmichael. Fox wrote Scott 2 letters on this matter on June 12,[16] and a meeting was held on June 17. Fox, Carmichael, Scott and an individual named "Ron" were present.

According to Fox, the meeting lasted for "awhile." Scott and Carmichael traded accusations. Scott said that Carmichael started out as "such a good employee," but "after this mess" was "one of the worst."

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became so nervous that the air hose was cut accidentally.

[15]G.C. Exh. 7.

[16]G.C. Exhs. 9, 10.

He wished that Carmichael would go somewhere else and find another job. Scott had changed because his attitude toward her had changed. Scott repeated that Carmichael had become "one of the worst women in this plant." Fox asked whether Carmichael had any write-ups, and Scott said that she had none. The meeting ended with Scott agreeing not to "harass" Carmichael any more. Carmichael then left, and a separate conversation ensued between Scott and Fox. Scott said he had no problems working with Fox, but that Carmichael had become one of the worst employees.

Scott denied telling Fox that Carmichael was the worst employee he ever had - she was only marginal. He denied telling Fox that there were no write-ups in Carmichael's file, and commented that in fact there were such write-ups. Scott

was asked whether he told Fox that he had no problems with Carmichael "until this mess started, or words to that effect." He answered: "I have never used the word "mess".

2. Factual analysis

Scott's answer was evasive on whether he told Fox that he had no problems with Carmichael until the "mess" started. Fox was a more truthful witness, and I credit her testimony on this point. Because of Fox' greater credibility, I also accept her testimony that Scott told her that Carmichael had started out as "such a good employee", but had become one of the worst after "all this mess", and that Scott wished she would find a job elsewhere.

Scott was correct in asserting that Carmichael in fact did have write ups in her file at the time of Fox' inquiry about the matter. However, this is not

determinative of the issue as to whether he told Fox that there were no such write ups. If he had agreed that there were and Fox had asked to see them, they may not have survived the Union's scrutiny. Further, Scott contended that they were not disciplinary in nature. Because Fox was a more truthful witness, I credit her on this issue.

At about the beginning of July 1991, Carmichael told Scott that she was quitting. Scott did not encourage her to do so, and Carmichael in fact did not resign.

E. Carmichael's discharge

1. The rule on signing timecards

The Company predicates Carmichael's discharge on her asserted refusal to sign her timecard. Scott testified that the Company required such signatures in order to avoid disputes over the amount of time

worked. The Company's 2-week pay period ended on Tuesday, and the employees were required to sign their cards on Tuesday afternoon so that the hours worked could be reported to a payroll company the following morning. Checks were distributed on Friday. The policy on employee signing of the timecards had been in effect since at least August 1990.

There were, however, occasions on which employees had not signed by Tuesday afternoon. According to Scott, there are one or two of these every payroll period. His procedure is to take the timecards to his "downstairs" office, and ask the employees to come there and sign. Carmichael testified without contradiction that Scott on occasion permitted employees to sign their timecards on Friday, before receiving their pay checks. I credit her testimony.

2. The events of August 27, 1992

(a) Summary of the evidence

Carmichael testified that Scott approached employees in the break area on August 27, 1991, a Tuesday, and said that any employee having problems with signing timecards should see him after work. Candy B. Headley, a witness called by Respondent, corroborated Carmichael. The latter obtained Supervisor Shipp's permission to discuss the matter with Scott after the break on August 27. According to Carmichael, she told the Company president that she was opposed to the rule, because she did not have to sign her timecard when she started working for the company, and the rule was imposed only after another employee filed for unemployment compensation benefits. Scott replied that it was his building, that he could change the rules if he wanted to,

and that he would fire Carmichael if she did not sign her timecard. Carmichael replied that she was going to sign, and that she had been doing so. She was not asked to sign her card at that time.

Carmichael contended that she asked Scott for permission to leave early because she had to take the grandmother to the doctor, and that Scott granted this request. At 10:30 a.m., one of Scott's sons, Everett (Scott), told Carmichael that a neighbor had called and reported a prowler around her house. Everett told her that she could leave, and she did so. She forgot to sign her timecard.

Scott's version is that he approached the work area at about 9:00 a.m., and that Carmichael asked for permission to leave by 12:00 noon or 12:30 p.m. Scott granted this request. He then asked her to sign her card because she had failed to sign it

timely during the 2 prior pay periods. Carmichael replied that she did not have to sign it. About an hour later, at 10:00 a.m., Carmichael came to his office and again requested permission to leave early. Scott assertedly replied that he had already granted this request. He again asked Carmichael to sign the timecard, and she replied that she did not have to. Scott took no action because "at that point the time hadn't passed that we had to pick up the cards." According to Scott, Carmichael had clocked out for the lunch period, returned, and was told that somebody was breaking into her house. She had not clocked in, but left again - without permission, according to Scott.

(b) Factual analysis

Carmichael's testimony is more probable than Scott's. The record contains no reason why Carmichael, after

signing timecards since the inception of the rule, would suddenly have refused to do so. It is unlikely that, after receiving permission at 9:00 a.m. to leave early, she would have announced to Scott that she was not going to sign her timecard - and then would have repeated the same request and the same refusal an hour later. It is undisputed that these events took place on Tuesday morning, prior to expiration of the timecard signing deadline under its most rigid application. Because of the improbabilities in Scott's testimony, the fact that he admitted having a faulty memory, and the fact that Carmichael appeared to be a more truthful witness, I credit her version of the events on August 27.

3. Carmichael's Discharge on August 28, 1992

(a) Summary of the Evidence

The events leading to Carmichael's discharge on August 28 are the subject of conflicting accounts of four witnesses. According to Carmichael, she arrived at the plant at the starting time of 5:30 a.m. The first break, 10 minutes in duration, was scheduled for 8:30 a.m. Prior to that time, Supervisor Shipp approached her and asked her to sign her timecard. According to established practice, this meant going to Scott's "downstairs" office. Carmichael replied to Shipp that she was not feeling well, and was "taking a break." Ship walked away, and returned. He told Carmichael to take her break, and that she could "sign it afterwards." Shipp said that he would let another employee (Pamela Collins) go first to sign her own timecard.

Carmichael then went to the break area, which was not enclosed, and sat down. About 5 minutes into the break, Shipp approached her and again asked her to sign her timecard. Carmichael replied that she was not feeling well. Shipp then went in the direction of the office. Before he arrived there, Scott approached the break area, but did not reach it. He started shouting at Carmichael, and asked whether she was "on the clock." When Carmichael replied affirmatively, Scott told her that she was fired for insubordination. He never asked her to sign her timecard.

Shipp testified about these events, but erroneously placed them the day before, on August 27. He later corrected this testimony and stated that the events took place on August 28. Shipp stated that Scott told him to bring Carmichael

and Pamela Collins to the office to sign their timecards. Shipp then spoke to Carmichael and Collins "at break time." He denied that Carmichael told him that she was not feeling well, and contended that she said she would not sign "at that time." Shipp took Collins to the office to sign her own timecard.

Shipp testified that he approached Carmichael in the break area at a table, and asked her three times to sign her timecard. She replied to the first request that she was not going to sign, and did not answer the other two requests.

Candy B. Headley, an employee called by Respondent as a witness, was in the break area with 10-12 employees during these events. She testified about a conversation between Carmichael and a management representative. However, unlike Sup[ervisor Shipp, Headley

testified that the management representative was Company president Scott, rather than Shipp. Headley stated that she did not see Shipp talking to Headley; Scott asked Carmichael three times to come to his office and sign her timecard, or she would be terminated. On each occasion, Carmichael replied that she would do so on Company time, not on her own time. She was "hollering" by the end of the conversation. As employees were getting up from the break area, Scott told Carmichael that she was fired. According to Headley, employees are permitted to wait until end of a break before signing their timecards.

Scott testified that Shipp reported to him that Carmichael refused to come to the office and sign her timecard. After another asserted request brought the same result, Scott went to the break area and

asked Carmichael to sign the timecard in his office. On direct examination, Scott testified that Carmichael replied, "I ain't going to sign." Another request brought another refusal, and Scott then asked whether she was on the timeclock. He did not get an answer, and then said that if she did not come to the office to discuss the matter, he would terminate her. After receiving no response, Scott terminated her, and told her to clock out. On cross-examination, Scott's attention was directed to Headley's testimony about Carmichael's responses, i.e., that she would not sign the card on Company time, not on her own time. Scott's answer was not responsive to this question. Asked the same question again, Scott replied that Carmichael "could have said that later because she was really beside herself."

Scott testified that the Company paid for break time, and that it was really Company time. Sometime employees are required to work through breaks. He gave as examples an order that had to be filled, or a truck waiting to get out. Asked whether employees are required to sign their timecards during breaks on a "regular basis," Scott replied, "Occasionally, yes." The Company president averred that employees required to work during breaks are given assurances that they will get the "lost" time back. Scott agreed that Carmichael did not receive any such assurances on this occasion.

Scott testified that Carmichael was discharged for insubordination[17] which

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[17]Scott listed other instances where insubordination had resulted in discharge - an employee threatened to "whip" Supervisor Shipp; an employee refused to

took place in front of other employees. He was asked about Carmichael's alleged insubordination on January 22, 1991, which also took place before other employees, but distinguished this on the ground that Carmichael on that occasion returned to work. The Company president testified that Carmichael's prior infractions had nothing to do with her discharge - it was based entirely on the incidents of August 28, 1991.

(b) Factual analysis

It is clear that, just before the 8:30 a.m. break on August 28, Supervisor Shipp asked Carmichael and Collins to go to the office to sign their timecards. Although Shipp denied that Carmichael told him she was not feeling well, he admitted

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move her parked car which prevented a truck from being loaded; and an employee chanted and refused to work.

that she said she would not sign "at that time." In addition, Shipp took Collins along to the office to get her timecard signed. I credit Carmichael's testimony that Shipp told her she could sign her timecard "afterwards," i.e, after the break.

The biggest conflict in the evidence is the identity of the management representative who repeatedly asked Carmichael in the break area to come to the office to sign her timecard. Headley, a witness for Respondent, was a truthful witness with good recall of the events. I credit her testimony, corroborated by Scott, that it was the Company president who did so.[18]

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[18]This does not invalidate Carmichael's testimony that Shipp also asked her to sign, since Headley merely testified that she did not see Shipp. The latter was a confused witness, and I do not credit his assertion, implicitly

I also credit Headley's testimony that Carmichael replied that she would sign the timecard on Company time, rather than her own time. Scott tacitly admitted this - his explanation that Carmichael may have said this "later" is not persuasive - there is no evidence of a "later" conversation between them. I also credit Headley's testimony that employees were not required to sign timecards during breaks. Scott's assertion that they were required to do so "occasionally" on a "regular" basis is contradictory, and the examples he gave of employees being required to work through breaks had a direct impact on Company operations, unlike the signing of a timecard.

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contradicted by Scott, that it was Shipp who made these requests. Although Carmichael stated that Scott never reached the break area, the area was not enclosed, and the boundaries may have been indistinct.

Finally, I note Scott's admission that Carmichael on this occasion, was not given the customary assurance that she would receive compensatory time for the lost break time.

F. Legal Analysis and Conclusions

The General Counsel has the burden of establishing a prima facie case sufficient to support an inference that protected conduct was a motivating factor in Respondent's discharge of Carmichael. Once this is established, the burden shifts to Respondent to demonstrate that the discharge would have taken place even in the absence of the protected conduct.[19]

Carmichael was the leading proponent of the Union, and the only employee on the

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[19]Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. den. 455 U.S. 989, approved in NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

negotiating committee. Respondent called her a "troublemaker" who was reporting to the Union. Respondent's representative told the Union that there was animosity between Carmichael and the Company president because of "all this mess," which was identified as the Company's experiences with the Union. The Company representative expressed opposition to Carmichael's appointment as a steward, and tried to get the Union to find her a job elsewhere. Because the Union refused to assure the Company that it would not appoint Carmichael as a steward, the Company changed its position, adversely to the Union, on elements of the contract to which it had tentatively agreed.

Respondent began inserting "warning reports" into Carmichael's file at about the time the Union campaign started. These principally concerned absences, and

the Company was unable to explain why prior absences, which had probably occurred, were not recorded prior to the advent of the Union campaign. The only explanation for warning reports issued in the absence of disciplinary action was record-keeping. After the bargaining began, Respondent issued warning reports to Carmichael without giving her an equal opportunity to give her version of the incident in question. She had more typed reports in her file than any other employee. The timing of these actions and their disparate nature constitute evidence of discriminatory motivation. The Company president told a Union representative that, although Carmichael had started out as a good employee, she had become one of the worse "after this mess," i.e., the advent of the Union campaign.

The General Counsel has thus established a strong prima facie that Carmichael's union activities were a motivating factor in Respondent's discharge of her. The fact that Respondent did not encourage Carmichael to resign when she stated this intention in July 1992 is insufficient to negate the prima facie case.

Respondent had not rebutted this case. Although it predicated its discharge of Carmichael on the ground that she refused to sign her timecard, the facts show that a Company supervisor gave her permission to take a break before signing. During the break, she was asked by the Company president to sign the card, and replied that she would do so on Company time, not her own time. This did not constitute a refusal to sign the card,

but, rather, an assertion that she would do so on the Company's time. Employees were not normally required to sign timecards during breaks. Although employees were sometimes required to work during breaks, these concerned essential Company operations - the Company has not established a similar need for the signing of timecards during a break. Finally, Carmichael was not given the customary assurance that her lost break time would be restored.

Respondent's rebuttal thus fails because Carmichael did not in fact commit the alleged offense of insubordination. Maremount Corp., 294 NLRB 11, 20, 42 (1989). I conclude that Respondent seized upon this incident to discharge the principal union activist. Paradise Post, 297 NLRB No. 147 (1990). In doing so, it

violated Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following:

**Conclusions of Law**

1. Forestwood Farms, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers Union, Local 1657, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Cassandra Carmichael on August 28, 1991, because of her union activities and sympathies, and other protected, concerted activities.

4. The unfair labor practices described in paragraph 3 constitutes an

unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

**The Remedy**

It having been found that Respondent engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged Cassandra Carmichael on August 28, 1991, it is recommended that Respondent be ordered to offer her immediate and full reinstatement to her former position, or, if that position no longer exists, to a substantially equivalent position, dismissing if necessary any employee hired to fill said position, and to make her whole for any loss of earnings she may have suffered by

reason of Respondent's unlawful conduct, by paying her a sum of money equal to the amount she would have earned from the date of her unlawful discharge to the date of an offer of reinstatement, less any net interim earnings, as prescribed in F.W. Woolworth Co., 90 NLRB 289 (1950), plus interest as computed in New Horizons for the Retarded, 282 NLRB 1173 (1987).[20]

It is also recommended that Respondent be ordered to post appropriate notices, to expunge from its personnel records all references to its unlawful discharge of Cassandra Carmichael, and to notify her in writing that such expunction has been made and that evidence of her

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[20]Under New Horizons, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. §6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in Florida Steel Corp., 231 NLRB 651 (1977).

unlawful discipline will not be used as a basis for future personnel actions against her.

Upon the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended:[21]

**ORDER**[22]

Forestwood Farms, Inc., its officers, agents, successor, and assigns, shall:

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[21]If no exceptions are filed as provided by sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22]In the event no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, of the National Labor Relations Board, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

1. Cease and desist from:

(a) Discouraging membership in United Food and Commercial Workers Union, Local 1657, AFL-CIO, or any other labor organization by discharging employees because of their protected, concerted activities, or by discrimination against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(b) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer Cassandra Carmichael full reinstatement to her former position, or, if such position no longer exists, to

a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and make her whole for any loss of earnings she may have suffered by reason of Respondent's unlawful discharge of her on August 28, 1991, in the manner described in the section of this Decision entitled "The Remedy."

(b) Expunge from its personnel records or other files any reference to its discrimination against Cassandra Carmichael, and notify her in writing that such action has been taken and that evidence of her unlawful discharge will not be used as a basis for future personnel actions against her.

(c) Preserve, and upon request, make available to the Board or its agents for copying all payroll records, social security payment records, timecards, and

all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(d) Post at its office and place of business in Birmingham, Alabama, copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 10, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken

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[23]If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

"EXHIBIT"

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities

**WE WILL NOT** discourage membership in United Food and Commercial Workers Union,

Local 1657, AFL-CIO, or any other labor organization, by discharging employees because of their protected, concerted activities, or by otherwise discriminating against them.

**WE WILL NOT** in any other like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act.

**WE WILL** offer Cassandra Carmichael full reinstatement to her former position, and make her whole, with interest, for any loss she may have suffered because of our unlawful discharge of her.

WE WILL expunge from our records all references to our unlawful discharge of Cassandra Carmichael, and notify her in writing that we have done so and that evidence of her discharge will not be used as a basis for future personnel actions against her.

FORESTWOOD FARMS, INC.

(Employer)

DATED:_____ By:_____
(Representative)
(Title)

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, National Labor Relations Board, 101 Marietta Street, Suite 2400, N.W., Atlanta, Georgia 30323. Telephone (404) 331-2896.

APPENDIX B

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DECISION OF AUGUST 27, 1993

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 93-6035
Non-Argument Calendar

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National Labor Relations Board

No. 10-CA-25545

FORESTWOOD FARMS, INC.

Petitioner/Cross-Respondent

VS.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1657

Intervenor

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Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

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FILED: AUGUST 27, 1993

Before HATCHETT and ANDERSON, Circuit Judges, and JOHNSON, Senior Circuit Judge

JUDGMENT

This cause came to be heard on the petition of Forestwood Farms, Inc. for review of an order and the National Labor Relations Board's application for enforcement of its order, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the application for enforcement of the National Labor Relations Board's order in this cause be and the same is hereby AFFIRMED;

It is further ordered that petitioner, cross-respondent pay respondent, cross-petitioner the costs on

appeal to be taxed by the Clerk of this Court.

For the Court: Miguel J. Cortez, Clerk

By: /Matt Davidson/
Deputy Clerk

# APPENDIX C

# THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DECISION OF NOVEMBER 19, 1993

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 93-6035

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FORESTWOOD FARMS, INC.

Petitioner/Cross-Respondent

VS.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1657

Intervenor

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On Appeal from the United States District Court for the Northern District of Alabama

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FILED: NOVEMBER 19, 1993

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: HATCHETT and ANDERSON, Circuit Judges, and JOHNSON, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the

Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/John W. Hatchett/

United States Circuit Judge